


dated June 23, 2006.

9. Attached hereto as Exhibit "7" is a true and correct copy of the relevant pages of the Deposition of David Su, TWC's designated PMK, taken October 14, 2009.
10. Attached hereto as Exhibit "8" is a true and correct copy of the Time Warner Cable's Work Order for Plaintiff Mark Swinegar.
11. Attached hereto as Exhibit "9" is a true and correct copy of the relevant pages of the Deposition of Michael Pemberton, a TWC CSR, February 17, 2010.
12. I, Douglas Caiafa, hereby certify that, I have attached and/or otherwise served true and correct copies of the exhibits referenced herein.

I declare under penalty of perjury the foregoing is true and correct.

Executed this 9th day of November, 2010, at Los Angeles, California.



DOUGLAS CAIAFA, Declarant

Exhibit 1

1 DOUGLAS CAIAFA, ESQ. (State Bar No. 107747)
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11 Attorneys for Plaintiffs

12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **FOR THE COUNTY OF LOS ANGELES**

14 MARK SWINEGAR, an individual; and)
15 MICHELE OZZELLO-DEZES, an individual;)
16 individually and on behalf of all others)
17 similarly situated,)

18 Plaintiffs,

19 vs.

20 TIME WARNER CABLE, INC., a Delaware)
21 Corporation; and DOES 1 through 1,000,)
22 inclusive,)

23 Defendants.

CASE NO.: BC 389755

CLASS ACTION

Honorable William F. Highberger
Dept. 307

**SECOND AMENDED COMPLAINT FOR
RESTITUTION AND INJUNCTIVE
RELIEF**

[PROPOSED]

1. UNLAWFUL BUSINESS PRACTICES
(California Business & Professions Code,
Section 17200)

Trial Date: None Set

Complaint Filed: April 28, 2008

24 Come now Plaintiffs MARK SWINEGAR and MICHELE OZZELLO-DEZES,
25 individually and on behalf of all others similarly situated, and for causes of action against
26 Defendants and each of them, allege as follows:
27
28

1 **INTRODUCTION**

- 2 1. This complaint involves a representative action for restitution and injunctive relief, and is
3 brought by persons who have at some time between April 28, 2004, and the present, paid
4 a rental fee to Defendant TIME WARNER CABLE, INC. ("TWC" or "Defendant") for
5 the use of a cable television converter box and/or remote control device within the state
6 of California which they did not affirmatively request by name.
- 7 2. Defendant TWC provides, among other things, cable television service to consumers
8 throughout the state of California.
- 9 3. As part of TWC's cable television service, TWC offers different levels of service,
10 including premium programming such as HBO and Cinemax, as well as Basic and/or
11 Standard Cable service.
- 12 4. TWC charges its customers a rental fee for the use of converter boxes and/or remote
13 control devices which many, if not all, of those customers never affirmatively request by
14 name.
- 15 5. TWC's practice of charging customers for converter boxes and/or remote control devices
16 which they did not affirmatively request by name is unfair, deceptive, and in violation of
17 California and federal law as plead more fully herein.

18 **PARTIES**

- 19 6. Plaintiff MARK SWINEGAR ("SWINEGAR") is, and at all times relevant hereto has
20 been, an individual and a resident of Los Angeles County, California. At some time
21 during the period from April 28, 2004, to the present, SWINEGAR paid a rental fee to
22 TWC for the use of a cable television converter box and/or remote control device within
23 the state of California which he did not affirmatively request by name.
- 24 7. Plaintiff MICHELE OZZELLO-DEZES ("OZZELLO") is, and at all times relevant
25 hereto has been, an individual and a resident of Los Angeles County, California. At some
26 time during the period from April 28, 2004, to the present, OZZELLO paid a rental fee to
27 TWC for the use of a cable television converter box and/or remote control device within
28 the state of California which she did not affirmatively request by name.

- 1 8. Defendant TWC is a Delaware Corporation authorized to do business in California.
2 Plaintiffs are informed and believe, and on that basis allege, that TWC provides cable
3 television service to over 2,000,000 consumers in the state of California, and thus has
4 sufficient contacts with California for this Court to exercise jurisdiction over it.
- 5 9. The true names and capacities of the defendants named herein as DOES 1 through 1,000,
6 inclusive, whether individual, corporate, associate or otherwise, are unknown to Plaintiffs
7 who therefore sue such defendants under fictitious names pursuant to *California Code of*
8 *Civil Procedure* §474. Plaintiffs are informed and believe, and on that basis allege, that
9 these defendants, DOES 1 through 1,000, are in some manner or capacity, and to some
10 degree, legally responsible and liable for the damages of which Plaintiffs complain.
11 Plaintiffs will seek leave of Court to amend this Complaint to set forth the true names and
12 capacities of all fictitiously-named defendants within a reasonable time after they become
13 known.

14 **JURISDICTION AND VENUE**

- 15 10. This is a civil action brought under and pursuant to the *California Business & Professions*
16 *Code* ("UCL").
- 17 11. This Court has jurisdiction over this action pursuant to *Code of Civil Procedure* §410.10.
- 18 12. The monetary relief which Plaintiffs seek is in excess of the jurisdictional minimum
19 required by this Court and will be established according to proof at trial.
- 20 13. Venue is proper in this Court pursuant to *Code of Civil Procedure* §§395 and 395.5
21 because the unlawful and unfair business practices at issue were performed and/or
22 engaged in within the county of Los Angeles, California.
- 23 14. Plaintiffs are informed and believe, and on that basis allege, that Defendants TWC and
24 DOES 1 through 1,000, and each of them, have had sufficient contacts with the state of
25 California for this Court to exercise jurisdiction over them.

26 **FACTUAL ALLEGATIONS**

- 27 15. From December 2006 to February 2007, SWINEGAR received cable television service
28 from TWC in Los Angeles, California.

- 1 16. From September 2007 to March 2008, SWINEGAR also received cable television service
2 from TWC in Los Angeles, California.
- 3 17. During the above-referenced time periods, SWINEGAR paid a rental fee to TWC for the
4 use of the converter box and remote control device.
- 5 18. At the time of installation in September of 2007, TWC installed a converter box to
6 SWINEGAR's television and left him with a remote control device.
- 7 19. During the above-referenced time periods, SWINEGAR never affirmatively requested by
8 name either a converter box or remote control device from TWC.
- 9 20. From 2004 to the present, OZZELLO received cable television service from TWC in Los
10 Angeles, California.
- 11 21. During the above-referenced time periods, OZZELLO paid a rental fee to TWC for the
12 use of the converter box and remote control device.
- 13 22. At the time of installation, TWC installed a converter box to OZZELLO's television and
14 left her with a remote control device.
- 15 23. During the above-referenced time period, OZZELLO never affirmatively requested by
16 name either a converter box or remote control device from TWC.
- 17 24. Plaintiffs are informed and believe and on that basis allege that Defendant provides, and
18 has provided, cable television service to over 2,000,000 persons throughout the state of
19 California at some time during the Class Period.
- 20 25. Plaintiffs are further informed and believe and on that basis allege that Defendant has
21 charged a significant portion of its cable television service customers monthly rental fees
22 for use of one or more cable converter boxes and/or remote control devices, despite the
23 fact that most, if not all, of those customers never affirmatively requested either device by
24 name from Defendant.
- 25 26. Plaintiffs are informed and believe, and on that basis allege that by virtue of Defendant's
26 unlawful and unfair business practices alleged herein, Defendant has received substantial
27 sums of money, and has realized profits from those unlawful and unfair practices since
28 April 28, 2004. Specifically, TWC regularly, intentionally, and systematically extracts

1 from its cable television service customers a monthly rental fee for the use of a cable
2 converter box and/or a remote control device which many, if not all, of those customers
3 never affirmatively requested by name.

- 4 27. The relief sought in this action is necessary to restore to Plaintiffs and to members of the
5 proposed Class the money which Defendant has illegally acquired through the unlawful
6 and unfair treatment of each Plaintiff and each Class Member as described herein.
7 Plaintiffs and all Class Members are entitled to restitution of all amounts paid by such
8 persons to TWC throughout the relevant Class Period for the rental of a cable converter
9 box and/or remote control device which they did not affirmatively request by name. In
10 addition, Plaintiffs are entitled to an injunction permanently enjoining Defendant from
11 committing the unlawful conduct alleged herein.

12 **CLASS ACTION ALLEGATIONS**

- 13 28. Plaintiffs bring this action on behalf of themselves and on behalf of all other persons
14 similarly situated as a class action pursuant to *California Code of Civil Procedure* §382,
15 namely each and every person who, at any time during the period from April 28, 2004, to
16 the present ("Class Period"), paid a rental fee to TWC for the use of a cable television
17 converter box and/or remote control device which they did not affirmatively request by
18 name in connection with cable television service they received within the state of
19 California.
- 20 29. The class in this action may be defined as: "All persons who, at any time from April 28,
21 2004 to the present, paid a rental fee to TWC for the use of a cable television converter
22 box and/or remote control device which they did not affirmatively request by name in
23 connection with cable television service they received within the state of California" (the
24 "Class").
- 25 30. Each Plaintiff is a member of the Class.
- 26 31. The number of persons in the Class is so numerous that joinder of all such persons would
27 be impracticable. While the exact number and identities of all such persons are unknown
28 to Plaintiffs at this time and can only be obtained through appropriate discovery,

- 1 Plaintiffs are informed and believe, and on that basis allege that the Class includes over
2 2,000,000 persons.
- 3 32. Disposition of Plaintiffs' claims in a class action will be of benefit to all parties and to the
4 Court.
- 5 33. There is a well-defined community of interest presented by the Class in that, among other
6 things, each member of the Class has an interest in obtaining appropriate legal relief for
7 the harm of which Plaintiffs complain, and obtaining other adequate compensation for the
8 common injuries which Plaintiffs and all Class Members have suffered as a result of
9 Defendant's actions.
- 10 34. A class action in this case is superior to any other available method for the fair and
11 efficient adjudication of the claims presented herein. Proof of a common or single set of
12 facts will establish the right of each Class Member to recover. Further, Plaintiffs are
13 informed and believe, and on that basis allege, that the individual claims of each Class
14 Member are so small that, but for a class action, such claims will go unprosecuted.
15 Consequently, this class action is in the public interest and in the interests of justice.
- 16 35. The prosecution of separate actions by individual Class Members would create a risk of
17 inconsistent and/or varying adjudications with respect to individual Class Members
18 which would or may establish incompatible standards of conduct for Defendant.
- 19 36. The prosecution of separate actions by individual Class Members would also create a risk
20 of adjudications with respect to individual Class Members which would, as a practical
21 matter, be dispositive of the interests of other Class Members not parties to the particular
22 individual adjudications, and/or would or may substantially impede or impair the ability
23 of those other members to protect their interests.
- 24 37. Common questions of fact and law exist in this case with respect to the Class which
25 predominate over any questions effecting only individual Class Members and which do
26 not vary between Class Members.
- 27 38. The common questions of fact involved in this case include, without limitation:
28 whether Class Members received cable television service from TWC at any time during

1 the relevant Class Period; whether Class Members paid a rental fee to TWC for the use of
2 a converter box and/or remote control device during the relevant Class Period; and,
3 whether TWC has a record of any Class Member having made an affirmative request by
4 name for either the converter box and/or remote control device they have paid rental fees
5 for.

6 39. The common questions of law involved in this case include, without limitation: whether
7 the imposition of a rental fee for cable converter boxes and/or remote control devices by
8 TWC which Class Members did not affirmatively request by name is unlawful and/or
9 unfair in violation of the UCL; and, whether Class Members who paid a rental fee to
10 TWC for the use of a cable converter box and/or remote control device which they did
11 not affirmatively request by name are entitled to restitution of those monies from TWC.

12 40. Plaintiffs and each Class Member have lost money as a result of a common course of
13 conduct engaged in by Defendant as complained of herein.

14 41. The claims of the named Plaintiffs in this case are typical of those of all other Class
15 Members, in that, among other things, Plaintiffs each paid TWC rental fees for one or
16 more cable converter boxes and/or remote control devices which they did not
17 affirmatively request by name.

18 42. The claims of the named Plaintiffs are coincident with, and not antagonistic to, the claims
19 of the other Class Members which they seek to represent.

20 43. The named Plaintiffs will fairly and adequately represent and protect the interests of the
21 Class Members which they seek to represent. Plaintiffs do not have any interests which
22 are antagonistic to the interests of the proposed Class.

23 44. Counsel for Plaintiffs are experienced, qualified and generally able to conduct complex
24 class action litigation.

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1 **FIRST CAUSE OF ACTION**

2 **UNLAWFUL BUSINESS PRACTICES**

3 (*California Business & Professions Code §17200, et seq.*)

4 (By All Plaintiffs on behalf of themselves and all other Class Members against All Defendants)

5 45. Plaintiffs re-allege and incorporate by reference, as though fully set forth herein,
6 paragraphs 1 through 44 of this Complaint.

7 46. Since April 28, 2004, and at all times relevant hereto, by and through the conduct
8 described herein, Defendant has engaged in unfair, unlawful and/or fraudulent business
9 practices, in violation of *California Business and Professions Code §17200, et seq.*, and
10 has thereby deprived Plaintiffs and all Class Members of money, fundamental rights and
11 privileges guaranteed to all consumers under California law.

12 47. The acts and conduct of Defendant complained of herein have constituted unlawful,
13 unfair and/or fraudulent business practices and/or acts, including, without limitation, the
14 practice of charging Class Members rental fees for use of a cable converter box and/or
15 remote control device which those Class Members did not affirmatively request by name.

16 48. At all times relevant to this Complaint, 47 U.S.C. §543(f) has been in full force and effect,
17 and provides: "A cable operator shall not charge a subscriber for any service or
18 equipment that the subscriber has not affirmatively requested by name. For purposes of
19 this subsection, a subscriber's failure to refuse a cable operator's proposal to provide such
20 service or equipment shall not be deemed to be an affirmative request for such service or
21 equipment."

22 49. TWC has charged Plaintiffs and each Class Member for a cable converter box and/or
23 remote control device that they have not affirmatively requested by name.

24 50. Defendant's failure to obtain any Class Member's affirmative request by name for a cable
25 converter box and/or remote control device, prior to charging Class Members for such
26 equipment violates the Cable Television Consumer Protection and Competition Act of
27 1992, 47 U.S.C. §543(f) ("Cable Act"). Defendant's violation of the Cable Act
28 constitutes an unlawful business practice in violation of the UCL.

1 51. As a result of Defendant's unfair, unlawful and/or fraudulent business practices, Plaintiffs
2 and all Class Members have lost money, namely all amounts paid by such Class Members
3 for rental of equipment they did not affirmatively request by name.

4 52. All of the acts described herein are unlawful and in violation of public policy; and in
5 addition are immoral, unethical, oppressive, fraudulent and/or unscrupulous, and thereby
6 constitute unfair, unlawful and/or fraudulent business practices in violation of the UCL.

7 53. Plaintiffs and all Class Members are entitled to and do seek such relief as may be
8 necessary to restore to them the money which Defendant has acquired, or of which
9 Plaintiffs and all Class Members have been deprived, by means of the above-described
10 unfair, unlawful and/or fraudulent business practices.

11 54. Plaintiffs and all Class Members are further entitled to and do seek a declaration that the
12 above described business practices are unfair, unlawful and/or fraudulent, and injunctive
13 relief restraining Defendant from engaging in any of the above-described unfair, unlawful
14 and/or fraudulent business practices in the future.

15
16 **PRAYER FOR RELIEF**

17 WHEREFORE, Plaintiffs pray for judgment against Defendant as follows:

18 **CLASS CERTIFICATION**

19 1. That this action be certified as a class action;

20 2. That Plaintiffs MARK SWINEGAR and MICHELE OZZELLO-DEZES be certified as
21 the representatives of a class consisting of: "All persons who, at any time from April 28,
22 2004 to the present, paid a rental fee to TWC for the use of a cable television converter
23 box and/or remote control device which they did not affirmatively request by name in
24 connection with cable television service they received within the state of California"; and,

25 3. That Plaintiffs' counsel be certified as counsel for the class.

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28 ///

1 FIRST CAUSE OF ACTION

2 UNFAIR BUSINESS PRACTICES

- 3 1. That the business practices alleged herein be declared in violation of the public policy of
4 the State of California, including but not limited to *California Business and Professions*
5 *Code* §17200, *et seq.*;
- 6 2. For a preliminary and permanent injunction to prevent the use or employment by
7 Defendant of each practice alleged herein and found to be an unfair, unlawful and/or
8 fraudulent business practice;
- 9 3. For a further order to restore to Plaintiffs and all Class Members (i.e., restitution of) any
10 money which Defendant may have acquired by means of each practice alleged and found
11 herein to be an unfair, unlawful and/or fraudulent business practice; and,
- 12 4. For such other and further relief as this Court may deem just and appropriate.

13
14 Dated: October 21, 2008

DOUGLAS CAIAFA, APLC
LAW OFFICE OF CHRISTOPHER J. MOROSOFF

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16
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18 By: _____
19 DOUGLAS CAIAFA
20 Attorneys for Plaintiffs
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Exhibit 2

CONFORMED COPY
ORIGINAL FILED
Superior Court of California
County of Los Angeles

JUL 29 2010

John A. Clarke, Executive Officer/Clerk
By *[Signature]*, Deputy
[Signature]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

MARK SWINEGAR, et al.,

Plaintiffs,

v.

TIME WARNER CABLE, INC., et al.,

Defendants.

Casc No. BC389755

ORDER RE DEFENDANT TIME
WARNER CABLE INC.'S MOTION
FOR SUMMARY JUDGMENT

Place: Dept. 307
Judge: Hon. William F. Highberger
Trial Date: None set

I

INTRODUCTION

Plaintiffs, cable subscribers, bring this action under Business and Professions Code § 17200 ("UCL") alleging that defendant Time Warner Cable Inc. violated the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 543(f), by charging plaintiffs for converter boxes and remote controls that plaintiffs did not "affirmatively request by name." Defendant Time Warner Cable moved for summary judgment against plaintiffs' single cause of action. The matter was heard on May 14, 2010, and taken under submission. Having considered oral argument and all of the papers filed by the parties, the Court denies defendant's motion.

II

PROCEDURAL HISTORY AND UNDISPUTED FACTS

A. Procedural History

This is class action for restitution and injunctive relief brought by persons who paid a rental fee during the class period to Defendant Time Warner Cable, Inc. for the use of a cable television converter box and/or remote control device within the state of California which they did not affirmatively request by name with their cable service. Putative class representatives Mark Swinegar and Michele Ozello-Dezes were customers of defendant and bring this action on behalf of others similarly situated.

The original Complaint, filed on April 28, 2008, contained allegations pursuant to Business & Professions Code § 17200, but had phrased the alleged violation in terms of defendant charging cable subscribers for "a converter box that plaintiffs did not need" with their cable service. Defendant demurred to the Complaint, primarily on grounds of standing, and plaintiffs amended as of right. Plaintiffs then filed a First Amended Complaint, which contained allegations that defendant had violated Business & Professions Code § 17200, California Civil Code § 1750, and 47 U.S.C. § 543(f). Plaintiffs alleged that they were charged for a converter box that plaintiffs "did not affirmatively request by name" with their services. The Court heard oral argument from the parties, who conceded that the First Amended Complaint contained defects, and the Court allowed plaintiffs to amend pursuant to the safe harbor provision of Code of Civil Procedure § 128.7.

The operative Second Amended Complaint was subsequently filed, and it asserts a single cause of action for unlawful business practices pursuant to Business & Professions Code § 17200, *et seq.*, predicated on a violation of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 543(f). The Court overruled defendant's demurrer to the Second Amended Complaint on February 23, 2009, holding that plaintiffs could state a claim under § 17200 for a violation of 47 U.S.C. § 53(f). Defendant now seeks summary judgment on the individual claims of the named representatives, Swinegar and Dezes.

B. Undisputed Facts

According to facts not in dispute, plaintiff Mark Swinegar was a legacy subscriber of Comcast when defendant Time Warner Cable Inc. acquired his franchise area in August of 2006. (UMF 1). Around this time, defendant mailed existing Comcast subscribers like Swinegar a copy of defendant's Subscriber Agreement. (UMF 2). The Subscriber Agreement contains the following provisions:

"(1)(a) This Agreement [and] the Work Order, . . . constitute the entire agreement between TWC and me. This Agreement supersedes all previous written or oral agreements between TWC and me. I am not entitled to rely on any oral or written statements by TWC's representatives relating to the subjects covered by these documents, whether made prior to the date of my Work Order or thereafter . . . (d) My acceptance of Services constitutes my acceptance of the terms and conditions contained in this Agreement . . . (2)(a) I agree to pay TWC for (i) all use of my Services . . . (ii) installation and applicable services charges, (iii) TWC Equipment . . . (2)(l) I agree that it is my responsibility to report TWC billing errors within 30 days from receipt of the bill so that service levels and all payments can be verified. If not reported within 30 days, the errors are waived." (UMF 10, 27).

The following year, in August of 2007, Swinegar telephonically placed an order with defendant. (UMF 3). Adrina Smith, the customer service representative who handled Swinegar's call does not remember anything specific about that conversation. (UMF 46). The parties dispute whether Swinegar requested a converter box or remote control from defendant. A technician then visited Swinegar's home for installation purposes, and presented Swinegar with a work order, which Swinegar signed. (UMF 7). Swinegar signed a second work order the very next day. (UMF 8). Both work orders stated "My signature on this work order indicates that I have received and agreed to the terms of the Time Warner Cable Residential Services Subscriber Agreement, separately provided to me by Time Warner Cable . . . The terms of the Time Warner Cable Residential Services Agreement . . . are incorporated into this work order by reference as if set out in full herein." (UMF 9).

Defendant then began billing Swinegar for "Surf N'View" service, and bills dated from September 22, 2007 through February 22, 2008 also reflect charges for "Digital Cable Receiver \$4.24 (Includes Remote Control At \$.23)." (UMF 11). During the class period of April 2004 through April 2009, defendant charged, and Swinegar paid, \$136.46 for the rental of a converter box and \$5.42 for

1 the rental of remote control devices. (UMF 36, 37). Swinegar did not complain to defendant about the
2 equipment charges within 30 days after receiving his first bill. (UMF 13). Some time in March 2008,
3 Swinegar called defendant to ask why his new HDTV was not working. (UMF 12). Defendant's
4 customer service representative informed him that he needed to exchange his regular digital receiver
5 for an HDTV receiver in order for his HDTV to receive defendant's HD programming. *Id.* Swinegar
6 took his regular digital receiver to one of defendant's stores to perform the exchange. *Id.*

7 Like Swinegar, plaintiff Michele Ozello-Dezes was a Comcast subscriber until August 2006,
8 when defendant took over her franchise area. (UMF 14). Between August 2006 and September 2007,
9 defendant did not change Dezes' level of service, and continued to bill her for the Digital Bronze
10 package and for an additional digital converter box and remote. (UMF 15). An installer installed
11 services at Dezes' house on September 29, 2007, and presented Dezes with a work order, which she
12 signed. (UMF 21, 22). Thereafter, Dezes received bills beginning in October of 2007 which itemize
13 charges for converter boxes and remote control units. (UMF 25). During the class period of April
14 2004 through April 2009, defendant charged, and Dezes paid, \$244.81 for the rental of a converter
15 box and \$10.69 for the rental of a remote control. (UMF 38, 39). Dezes was also charged for and paid
16 "digital programming fees" during the class period. (UMF 40). The parties dispute whether Dezes
17 requested a converter box or remote control from defendant.

18 Defendant has a policy and practice to send out a remote control with every converter box.
19 (UMF 70). Defendant's computerized billing system automatically adds a remote to each customer's
20 order for every converter included in the order. (UMF 93). Defendant's customer service
21 representatives are not trained to inform, and do not inform, customers that they will receive a remote
22 with every converter, or that they will pay a separate monthly fee for each remote they receive. (UMF
23 94).

III**ANALYSIS****A. Defendant's contentions**

Defendant Time Warner Cable contends that plaintiffs cannot prevail and it is entitled to summary judgment because (1) the Federal Communications Commission has interpreted 47 U.S.C. § 543(f) to require only customer affirmative consent to the provision of equipment or services, (2) undisputed facts confirm defendant's compliance with § 543(f) as to plaintiff Swinegar because he ordered equipment both orally and in writing, (3) undisputed facts confirm defendant's compliance with § 543(f) as to plaintiff Dezes because she confirmed her request for equipment in writing, (4) the binding legal terms of plaintiffs' executed work orders and contracts with defendant operate to preclude plaintiffs' equitable claims, (5) the common law voluntary payment doctrine bars equitable recovery under the UCL, and (6) plaintiff Dezes lacks standing because the undisputed facts confirm that she suffered no economic injury as a result of defendant's challenged conduct.

B. Plaintiffs' contentions

Plaintiffs contend that defendant is not entitled to summary judgment because (1) triable issues of fact exist as to whether plaintiffs affirmatively requested their converter boxes, (2) defendant fails to offer any evidence or show that plaintiffs affirmatively requested their remote controls, (3) plaintiffs' signing of a work order at the time of installation of equipment does not constitute an affirmative request, (4) defendant's common practices of obtaining consent when taking customer orders over the telephone does not prove that these plaintiffs themselves affirmatively requested their equipment and undisputed evidence shows that defendant's customer service representatives do not follow their common practices, (5) plaintiffs did not waive their rights under § 534(f) or the UCL by failing to report billing errors to defendant within 30 days of receipt of the bill, (6) the common law voluntary payment doctrine does not bar plaintiffs' claims because it does not apply to statutory claims and has never been used to defeat a UCL claim, and (7) plaintiff Dezes has standing because she suffered the economic injury of paying monthly fees to defendant for converter boxes and remote controls that she never affirmatively requested.

1 C. Legal Standard for Summary Judgment

2 Summary judgment is properly granted when there are no triable issues of material fact and
3 the moving party is entitled to judgment as a matter of law. Cal. Civ. Proc. Code § 437c(c). "The
4 purpose of the law of summary judgment is to provide courts with a mechanism to cut through the
5 parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to
6 resolve their dispute." *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843. A moving party
7 defendant is entitled to summary judgment if it establishes a complete defense to the plaintiff's
8 causes of action, or shows that one or more elements of each cause of action cannot be established.
9 Cal. Civ. Proc. Code § 437c(o). Generally, a moving party defendant bears the initial burden of
10 production to make a prima facie showing that no triable issue of material fact exists. Once the initial
11 burden of production is met, the burden shifts to the plaintiff to demonstrate a triable issue of material
12 fact. Cal. Civ. Proc. Code § 437c(p)(2). From commencement to conclusion, however, the moving
13 party bears the burden of persuasion that there is no triable issue of material fact and that the
14 defendant is entitled to judgment as a matter of law. *Aguilar, supra*, 25 Cal.4th at 850.

15 D. Requirements of 47 U.S.C. § 543(f)

16 Plaintiffs' allegations, as reflected in the Second Amended Complaint, rest on a single UCL
17 cause of action predicated on a violation of 47 U.S.C. § 543(f). The relevant provision provides:

18 (f) Negative option billing prohibited

19 A cable operator shall not charge a subscriber for any service or
20 equipment that the subscriber has not *affirmatively requested by name*. For
21 purposes of this subsection, a subscriber's failure to refuse a cable
22 operator's proposal to provide such service or equipment shall not be
deemed to be an affirmative request for such service or equipment.

23 47 U.S.C. § 543(f) (emphasis added). In the Code of Federal Regulations, the Federal
24 Communications Commission reiterates this prohibition on "negative option billing" and further
25 provides that "[a] subscriber's affirmative request for service or equipment may be made orally or in
26 writing." 47 C.F.R. § 76.981.¹ The Court previously interpreted the requirements of § 543(f) in

27 ¹ Negative option billing is defined elsewhere in the Code of Federal Regulations, in
28 connection with regulations affecting telemarketers, as "in an offer or agreement to sell or provide
(Footnote continues on next page.)

1 connection with defendant's Demurrer to the Second Amended Complaint. In overruling the
2 demurrer, the Court held that:

3 [t]he plain language is unambiguous and that the statute unequivocally
4 requires an "affirmative request by name." This interpretation is supported
5 by the second sentence of the statute that "a subscriber's failure to refuse a
6 cable operator's proposal to provide such service or equipment shall not
7 be deemed to be an affirmative request for such service or equipment." An
8 interpretation of affirmative request to "assent" would directly contradict
9 the words of the statute and the clear purpose of the Act, which was to
10 protect consumers and promote competition through regulation of the
11 cable operators. Although more limited in scope, § 534(f) is a consumer
12 protection statute as is Business and Professions Code § 17200. That a
13 cable subscriber must make an affirmative request for cable service or
14 equipment is underscored by the legislative history of the Act, which
15 addressed "negative option" billing.

16 (Order Overruling Demurrer to Second Amended Complaint, February 23, 2009). This continues to
17 be the Court's interpretation. In this context, compliance with § 534(f) requires a showing that the
18 customer made some kind of affirmative request for converter boxes and/or remote controls before
19 defendant may charge for and receive moneys for customer use of such hardware. Given that that
20 UCL "borrows" violation of other laws, including federal laws, and makes them independently action
21 as unlawful business practices, a violation of § 534(f) can therefore serve as predicate for a UCL
22 action. See *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th
23 163, 180.

24 **E. Triable issues as to whether plaintiffs affirmatively requested their equipment**

25 As moving party, defendant Time Warner Cable Inc. bears the burden of making a prima facie
26 showing of no triable issue as to its compliance with § 534(f). For the following reasons, defendant
27 is unpersuasive.
28

(Footnote continued from previous page.)

any goods or services, a provision under which the customer's silence or failure to take an affirmative
action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance
of the offer." 16 C.F.R. § 310.2(t).

1 1. Whether Swinegar affirmatively requested a converter box and remote control
2 when he ordered the Surf N' View package

3 According to undisputed facts, plaintiff Swinegar called defendant Time Warner Cable in
4 August 2007 and placed an order for cable services with a customer service representative. (UMF 3).
5 Swinegar admits that he asked for "Surf N' View," (Jaffe decl. Ex. A, Swinegar depo. At 108:22-
6 109:1), and consistent with this affirmative request, defendant began billing Swinegar for this service
7 with a bill dated September 22, 2007. (UMF 11; Su decl., Ex. II, September 2007 statement).
8 Nonetheless, bills dated from September 22, 2007 through February 22, 2008 also reflect a \$4.24
9 charge for a "Digital Cable Receiver" which itself includes a \$.23 charge for "Remote Control." *Id*
10 These are the equipment charges at issue.

11 Defendant fails to provide direct evidence that Swinegar orally made an affirmative request
12 for the "Digital Cable Receiver" and "Remote Control" reflected in these billing statements. The
13 recording of the actual telephone call is not available since it was overwritten pursuant to defendant's
14 retention policy. Adrian Smith, the customer service representative who handled Swinegar's
15 telephone call, does not remember anything specific about that conversation. (UF 46). In addition,
16 Swinegar maintains that he did not request a converter box or remote control by name from defendant
17 and was not advised of the charges for this equipment. (Swinegar, decl. in opp'n, ¶ 3).

18 Nonetheless, defendant contends that a sufficient oral affirmative request must have occurred,
19 *ipso facto*, since Swinegar could not have obtained the services he sought from defendant without the
20 customer service representative following standard procedures whereby the customer is informed of
21 the equipment and applicable charges and assent is received prior to processing the order. Based on
22 the declarations and evidence presented by defendant, in order to finalize a sale, the customer service
23 representative must summarize the customer's order and inform the customer of all applicable
24 charges, including additional equipment charges, and then obtain the customer's verbal confirmation
25 for all services and equipment ordered. (Su decl. ¶19).

26 For example, Adrina Smith, the customer service representative who spoke with Swinegar
27 and placed his order, testifies that it was her regular practice to inform customers of the applicable
28 equipment charges twice: first when describing the different types of boxes available, and second

1 when summarizing the order. (Smith decl. ¶ 8). According to her testimony, Smith does not complete
2 the order unless the customer verbally agrees that the services and equipment she has listed are
3 accurate and that the customer wants to proceed with the order. (Smith decl. ¶ 7). Further, Smith
4 assumes she followed such practices with Swinegar. *Id.*

5 Nonetheless, plaintiffs show a genuine dispute as to whether such standard procedures were
6 followed when Swinegar placed his order. Plaintiffs show that at Smith's deposition, they played for
7 her a recorded call between Smith and another customer. The deposition transcript shows Smith
8 admitting, as to this call, that she failed to inform the customer of the price of the equipment, never
9 used the word "remote" or "remote control," and failed to tell the customer of the applicable
10 equipment charges before finalizing the order. (Caiafa decl. Ex. 12, Smith depo. at 141-146). Given
11 this evidence, vis-à-vis Swinegar's declaration that he did not request a converter box or remote
12 control device by name and was further not advised of the applicable charges, plaintiffs have thereby
13 clearly demonstrated triable issues of fact as to whether Swinegar affirmatively requested both the
14 remote control and converter box at the time of subscription.

15 2. Whether Swinegar made an affirmative request when he exchanged his converter

16 Defendant also contends that Swinegar made a sufficient oral affirmative request for
17 equipment when he exchanged his converter box for an HD converter. It is undisputed that Swinegar
18 called defendant in March 2008 to ask why his new HDTV was not working. (UF 12). Defendant
19 informed him that he needed to exchange his regular digital receiver for an HDTV receiver in order
20 for his HDTV to receive defendant's HD programming. *Id.* Swinegar then took his regular digital
21 receiver to defendant's store to perform the exchange. *Id.* Consequently, subsequent bills reflect a
22 \$6.50 charge for a "HDTV Receiver" and no further charges for a remote control. (Su decl., Ex. 11,
23 March 2008 statement).

24 No other undisputed facts are given regarding this specific interaction between Swinegar and
25 defendant, and these facts alone are not a prima facie showing that Swinegar affirmatively requested
26 an HD Receiver. In fact, the evidence cited by defendant in support shows the contrary to what
27 defendant hopes to prove. The interrogatory response cited states that "Swinegar did not ask for an
28 HDTV Receiver and did not affirmatively request an HD converter by name. Mr. Swinegar did not

1 affirmatively request the HDTV receiver or remote at the time TWC swapped them out." (Jaffe decl.
2 Ex. C, Swinegar's Responses to TWC's Special Interrogatories, at No. 1, p. 5:4-9). Moreover, the
3 ambiguous deposition testimony cited tends to show that Swinegar exchanged his old converter for
4 the HD converter with the understanding that it was free and that he needed to "swap that out" in
5 order to see HD correctly. (Jaffe decl. Ex. A, Swinegar depo. at 83:8-84:7, 96:18-97:2, 133:18-23).
6 Thus, there remains a triable issue on this point.

7 3. Whether the Work Order constitutes an affirmative request

8 Defendant is similarly unpersuasive in construing its installation work order as a written
9 affirmative request sufficient to demonstrate compliance with § 543(f). It is undisputed that Swinegar
10 signed a written work order presented by defendant's technician after the technician installed
11 plaintiff's Surf N' View service. (UF 7). The work order includes the line item:

12 "F7 -F7 1 DGTL RCVR PK 4.24."

13 (Su decl. Ex. CC, August 30, 2007 Work Order). This document, however, contains no nominal
14 reference to the "Digital Cable Receiver" and "Remote Control" for which defendant thereafter began
15 imposing charges upon Swinegar. (UMF 11; Su decl., Ex. II, September 2007 statement).

16 Similarly, it is undisputed that plaintiff Dezes executed a work order on September 29, 2007.
17 (UF 21). In contrast to Swinegar's work order, the work order signed by Dezes contains four
18 references to a "DIGITAL RCVR" and "REMOTE." (Su decl. Ex. DD).

19 Given these circumstances, however, signing an installation work order which was obviously
20 generated by defendant to instruct its technicians is not an "affirmative request" by the subscriber to
21 be charged extra for needed hardware in compliance with § 543(f), particularly in the absence of
22 separate initials on a request for each extra hardware at extra monthly expense. In fact, construing the
23 mere act of signing a work order as a customer's "affirmative request" to be charged for equipment is
24 tantamount to the negative option billing that Congress addressed when it specifically provided that a
25 subscriber's failure to refuse a cable operator's proposal to provide equipment shall not be deemed an
26 affirmative request for such equipment. See 47 U.S.C. § 543(f).

1 **F. Whether plaintiffs waived their claims by failing to timely report billing errors**

2 Defendant next contends that the binding legal terms of plaintiffs' executed work orders and
3 contracts with defendant operate to preclude equitable §17200 claims as a matter of law because the
4 contract explicitly obligates plaintiffs to report any billing errors to defendant within thirty days of
5 receipt of the bill at issue, or be deemed to have waived any such claimed errors or disputes.
6 Defendant is unpersuasive.

7 Section 2(l) of plaintiffs' subscriber agreements provides: "I agree that it is my responsibility
8 to report TWC billing errors within 30 days from receipt of the bill so that service levels and all
9 payments can be verified. If not reported within 30 days, the errors are waived." (UF 10, Su decl. Ex.
10 GG at 369, para. 2(l)).

11 Such language may theoretically effectuate a waiver of a contract claim arising out the
12 subscriber agreement, but it fails to effectuate a waiver of rights granted by the Unfair Competition
13 Law to pursue a claim for money lost as the result of unfair competition, since this is important
14 statutory right designed to protect consumers. Defendant fails to cite authority that would support the
15 proposition that a consumer protection statute can be abrogated by private contract. In its Reply brief,
16 defendant cites *Tebbets v. Fidelity & Cas. Co.* (1909) 155 Cal. 137, 138, which involves a provision
17 in an insurance policy requiring an action to recover insurance under the contract be brought within
18 six months from the time of death. Although this contractually provided time period was shorter than
19 what would otherwise be the limitations period by statute, the California Supreme Court upheld the
20 provision (over 100 years ago) because the time period allowed was reasonable. *Id.* at 138. Defendant
21 also cites *Charnay v. Cobert* (2006) 145 Cal.App.4th 170, 183, which involves a contractual
22 provision limiting the time to assert a contract claim to ten days. The Court in *Charnay* rejected such
23 as inherently unreasonable. Since plaintiffs Swinegar and Dezes are not asserting contract claims
24 against defendant, these cases are wholly unhelpful to defendant.

25 In sum, defendant fails to show that plaintiffs' failure to report billing errors within 30 days
26 constitutes a waiver of their §17200 cause of action as a matter of law. Consumer protection statutes
27 like the Cable Act and the Unfair Competition Law serve an important public interest, and it is
28 illogical to abrogate these laws by private contract under the circumstances presented here.

G. Whether the voluntary payment doctrine bars plaintiffs from obtaining equitable recovery under the Unfair Competition Law

Defendant next contends that the "voluntary payment doctrine" bars plaintiffs' from obtaining restitution under the California Unfair Competition Law. Defendant is unpersuasive.

The voluntary payment doctrine, recognized in various forms in various jurisdictions, basically holds that a voluntary payment by a person who has full knowledge of all the facts cannot be recovered. *See Sierra Inv. Corp. v. Sacramento County* (1967) 252 Cal.App.2d 339, 342 (holding that taxes freely and voluntarily paid may not be recovered by a taxpayer in the absence of a statute permitting the refund thereof, and that this is so even if the taxes are illegally levied or collected).

Here, defendant fails to cite controlling authority in which the voluntary payment doctrine has been applied as a defense to §17200 cause of action seeking recovery of illegally collected monies. Rather, defendant cites tax refund cases and unpersuasive authority from other jurisdictions that have no bearing on the instant action. Accordingly, defendant fails to persuade why the voluntary payment doctrine should operate as a complete defense to plaintiffs' unfair competition cause of action.

H. Whether plaintiff Dezes has standing

Finally, defendant contends that plaintiff Dezes lacks standing because she suffered no economic injury since defendants' bundling of her into the Surf N' View package actually saved her money in comparison to her prior service. Defendant is unpersuasive.

In order to have standing to assert a §17200 cause of action, the plaintiff must have suffered injury in fact and lost money as a result of unfair competition. Bus. & Prof. Code § 17204.

According to plaintiffs' theory of the case, Dezes lost money because defendant engaged in unlawful negative option billing and charged her for equipment that she did not affirmatively request by name. This is a sufficient economic injury resulting from alleged unfair competition to support a finding that Dezes has standing. The fact that her current cable package may save her money in comparison to a prior package does not preclude the alleged negative option billing at issue. Accordingly, defendant fails to show that Dezes lacks standing.